

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GEORGINA R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C20-5730-MLP

ORDER

I. INTRODUCTION

Plaintiff seeks review of the denial of her applications for Disability Insurance Benefits and Supplemental Security Income. Plaintiff contends the administrative law judge (“ALJ”) erred by finding her alcohol abuse to be material to her disability, in discounting a treating physician’s opinions, and in finding that fibromyalgia was not medically determinable. (Dkt. # 7 at 1.) As discussed below, the Court AFFIRMS the Commissioner’s final decision and DISMISSES the case with prejudice.

II. BACKGROUND

Plaintiff was born in 1968; has a college degree and master’s of business administration; and has worked as a systems analyst, senior project manager, and clinical application manager.

1 AR at 262-63, 809. Plaintiff was last gainfully employed in May 2015. *Id.* at 281.

2 In June and July 2017, Plaintiff applied for benefits, alleging disability as of May 10,
3 2015. AR at 241-49. Plaintiff's applications were denied initially and on reconsideration, and
4 Plaintiff requested a hearing. *Id.* at 156-71, 174-89. After the ALJ conducted a hearing in March
5 2019 (*id.* at 38-80), the ALJ issued a decision finding Plaintiff not disabled. *Id.* at 15-31.

6 Utilizing the five-step disability evaluation process,¹ the ALJ found:

7 Step one: Plaintiff has not engaged in substantial gainful activity since her alleged onset
8 date.

9 Step two: Plaintiff has the following severe impairments: degenerative disc disease,
10 rheumatoid arthritis, depression, anxiety, and alcohol abuse.

11 Step three: These impairments do not meet or equal the requirements of a listed
12 impairment.²

13 Residual Functional Capacity ("RFC"): Plaintiff can perform light work with additional
14 limitations: she can lift/carry 20 pounds occasionally and 10 pounds frequently. She can
15 stand and/or walk six hours out of an eight-hour workday, and sit six hours out of an
16 eight-hour workday. She can frequently climb ramps and stairs, and occasionally climb
17 ladders, ropes, and scaffolds. She can occasionally crawl, and frequently perform other
18 postural activities. She can occasionally handle and finger. She needs to avoid
19 concentrated exposure to extreme cold and hazards. She can understand, remember, and
20 carry out simple instructions and tasks consistent with a Specific Vocational Preparation
21 level 2, in order to account for deficiencies in concentration and pace that may arise with
22 more complex work. She can tolerate occasional interaction with others. She needs
23 unscheduled breaks most days and would be absent from the workstation about 20 hours
per month.

Step four: Plaintiff cannot perform past relevant work.

Step five: There are no jobs that exist in significant numbers in the national economy that
Plaintiff can perform.

Drug Abuse and Alcoholism ("DAA") findings: If Plaintiff stopped the substance abuse,
she would continue to have a severe impairment or combination of impairments, but they
would not singly or in combination meet or equal the requirements of a listed
impairment.

¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 If she stopped the substance abuse, Plaintiff could perform light work with
 2 additional limitations: she could lift/carry 20 pounds occasionally and 10 pounds
 3 frequently. She could stand and/or walk six hours out of an eight-hour workday, and sit
 4 six hours out of an eight-hour workday. She could frequently climb ramps and stairs, and
 occasionally climb ladders, ropes, and scaffolds. She could occasionally crawl, and
 frequently perform other postural activities. She could occasionally handle and finger
 bilaterally. She would need to avoid concentrated exposure to extreme cold and hazards.

5 If she stopped the substance abuse, Plaintiff could perform her past work as a
 6 professional consultant and program manager. Her substance use is a contributing factor
 7 material to the determination of disability, because she would not be disabled if she
 stopped the substance use. Because Plaintiff's substance use disorder is a contributing
 factor material to the determination of disability, she has not been disabled within the
 meaning of the Social Security Act at any time from the alleged onset date through the
 date of the decision.

8 AR at 15-31.

9 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
 10 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
 11 Commissioner to this Court. (Dkt. # 1.)

12 **III. LEGAL STANDARDS**

13 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
 14 security benefits when the ALJ's findings are based on legal error or not supported by substantial
 15 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a
 16 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the
 17 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
 18 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error
 19 alters the outcome of the case." *Id.*

20 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
 21 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
 22 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
 23 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical

1 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
 2 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
 3 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*
 4 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one
 5 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

6 IV. DISCUSSION

7 A. The ALJ Did Not Err in Finding Fibromyalgia to be Not Medically 8 Determinable

9 The ALJ noted that Plaintiff's medical records mention fibromyalgia but found that
 10 because the record did not contain a diagnosis consistent with the criteria set forth in Social
 11 Security Ruling ("SSR") 12-2p, fibromyalgia was not a medically determinable impairment. AR
 12 at 18. Plaintiff argues that the ALJ erred in finding that her fibromyalgia was not medically
 13 determinable because it had been diagnosed by a rheumatologist and precise documentation is
 14 not required. (Dkt. # 7 at 11-12.)

15 Plaintiff's arguments are not persuasive. In order to be found medically determinable, an
 16 impairment must result from anatomical, physiological, or psychological abnormalities which
 17 can be shown by medically acceptable clinical and laboratory diagnostic techniques, and
 18 established by medical evidence consisting of signs, symptoms, and laboratory findings, not only
 19 by a statement of symptoms. 20 C.F.R. § 404.1521. The Commissioner has promulgated an SSR
 20 dedicated to explaining the diagnostic criteria for fibromyalgia. *See* SSR 12-2p, 2012 WL
 21 3104869 (Jul. 25, 2012).

22 Plaintiff does not dispute that, as the ALJ found, the record does not contain findings
 23 consistent with either set of diagnostic criteria set forth in SSR 12-2p. AR at 18. Plaintiff's
 rheumatologist's reference to Plaintiff's pain does not satisfy SSR 12-2p, and the rheumatologist

1 did not reference any of the diagnostic criteria for fibromyalgia, which distinguishes this case
2 from the cases cited by Plaintiff. (Dkt. # 7 at 11-12 (citing *Allen v. Colvin*, 2016 WL 7268128, at
3 *3 (W.D. Wash. Jan. 8, 2016) (citing *Conteras v. Astrue*, 378 Fed.App’x. 656 (9th Cir. 2010))).)
4 Plaintiff has not cited any binding authority indicating that a rheumatologist’s diagnosis of
5 fibromyalgia based on Plaintiff’s report of pain is sufficient to establish the existence of
6 fibromyalgia.

7 Instead, she argues that the ALJ should have assumed that the proper documentation
8 existed but were not included in the record, because Plaintiff’s fibromyalgia diagnosis had been
9 made prior to her alleged onset date. (Dkt. # 12 at 8.) Plaintiff has pointed to no authority
10 permitting — let alone requiring — the ALJ to assume the existence of a medically determinable
11 impairment based on findings that might have been made before the adjudicated period. Plaintiff
12 has not shown that the ALJ’s finding regarding fibromyalgia was erroneous based on the record
13 before him.

14 Furthermore, the ALJ indicated that even though he found Plaintiff’s fibromyalgia to be
15 not medically determinable, he “considered [Plaintiff’s fibromyalgia] diagnosis, signs, and
16 symptoms in assessing her chronic pain symptoms and her overall functional abilities.” AR at 18.
17 Under these circumstances, it does not appear that the ALJ’s step-two findings prejudiced the
18 remainder of the ALJ’s decision, and thus any possible error would be harmless. *See, e.g., Lewis*
19 *v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

20 **B. The ALJ Did Not Err in Finding Plaintiff’s DAA to be Material**

21 A claimant is not entitled to disability benefits “if alcoholism or drug addiction would . . .
22 be a contributing factor material to the Commissioner’s determination that the individual is
23 disabled.” 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must conduct a DAA

1 analysis and determine whether a claimant's disabling limitations remain absent the use of drugs
2 or alcohol. 20 C.F.R. §§ 404.1535, 416.935. That is, the ALJ must, first, identify disability under
3 the five-step procedure and, second, conduct a DAA analysis to determine whether substance
4 abuse was material to disability. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). "If
5 the remaining limitations would still be disabling, then the claimant's drug addiction or
6 alcoholism is not a contributing factor material to his disability. If the remaining limitations
7 would not be disabling, then the claimant's substance abuse is material and benefits must be
8 denied." *Parra v. Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007). Plaintiff bears the burden of
9 proving that DAA is not a contributing factor material to her disability. *Parra*, 481 F.3d at
10 747-48.

11 In this case, the ALJ performed the two-step materiality evaluation applicable to DAA
12 cases: the ALJ found that when Plaintiff's DAA was considered, her limitations were disabling,
13 but that if she stopped the DAA, her limitations would no longer be disabling. *See* AR at 15-31.
14 In light of these findings, the ALJ concluded that Plaintiff's DAA was material to the disability
15 determination and Plaintiff was therefore ineligible for benefits. *Id.* at 31.

16 Plaintiff contends that the ALJ's materiality finding is not supported by substantial
17 evidence because none of the medical opinions in the record indicate that Plaintiff's DAA was
18 material to her disability. (Dkt. # 7 at 5-6.) Plaintiff points to examining psychological opinions
19 indicating that Plaintiff's limitations would persist even if Plaintiff were sober, but, as noted by
20 the Commissioner and stated in the ALJ's decision, the examiners were unaware of the full
21 extent of Plaintiff's alcohol use when they opined that her limitations were not related to her
22 alcohol use. (*See* Dkt. # 11 at 12-13 (summarizing records referencing Plaintiff's ongoing
23 alcohol use between May 2015 and March 2019).) The ALJ explained that he did not find the

1 psychological opinions persuasive as to Plaintiff's functioning *without* alcohol use, given that
2 Plaintiff did not maintain more than three months of sobriety during the entire adjudicated
3 period. AR at 25-26. This is a reasonable reading of the examining opinions, particularly because
4 Plaintiff misrepresented the extent of her alcohol use to the examiners. *Compare id.* at 549
5 (Plaintiff's report to Nathaniel Sowa, M.D., that she had been sober for "the past couple of
6 months" in August 2017) *with id.* at 600 (Plaintiff's report to treating rheumatologist in July
7 2017 that she drinks alcohol "about twice [a] week"); *compare also id.* at 809 (Plaintiff's report
8 to Curtis Greenfield, Psy.D., in November 2017 that she had been sober "for three months now")
9 *with id.* at 580 (Plaintiff reporting "frequent alcohol use" that she was not ready to address in
10 September 2017), 770 (toxicology report showing Plaintiff's liver enzymes were elevated from
11 alcohol use in December 2017). Plaintiff does not challenge the ALJ's finding that her
12 self-reporting was not reliable, and the ALJ reasonably found that the examiners' opinions as to
13 Plaintiff's functioning while sober were unsupported and therefore less persuasive, due to their
14 reliance on Plaintiff's inaccurate self-reporting.³ *See id.* at 22.

15 To the extent that Plaintiff goes on to suggest that the ALJ's materiality finding is not
16 based on substantial evidence, Plaintiff overlooks the evidence cited throughout the ALJ's
17 decision indicating that Plaintiff's symptoms worsened with alcohol use. For example, the ALJ
18 noted that Plaintiff was able to work with the same impairments that she claimed to be disabling,
19 during the time period before her alcohol use increased, and she stopped working for reasons
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21 ³ Even if, as Plaintiff alleges (dkt. # 12 at 3-5), the amendments to the regulations regarding medical
22 opinions do not negate pre-amendment Ninth Circuit cases, the Ninth Circuit has previously held that a
23 claimant's inaccurate description of drug or alcohol use is a legally sufficient reason to discount a medical
opinion based on that description. *See, e.g., Oviatt v. Comm'r of Social Sec. Admin.*, 303 Fed.App'x. 519,
522 (9th Cir. Dec. 16, 2008). Thus, whether the Court applies the new medical regulations or Ninth
Circuit case law, the Court finds that the ALJ adequately explained why the examining opinions were
discounted or unpersuasive.

1 other than her impairments. *See, e.g.*, AR at 29. The ALJ also cited Plaintiff's report to a
2 provider that alcohol use made her depression and anxiety worse. *Id.* at 21 (citing *id.* at 832). The
3 ALJ further found that Plaintiff inconsistently sought treatment for depression and anxiety and
4 the record contains generally normal mental status examinations, although Plaintiff did report
5 some problems with mood. *Id.* at 25. All of this evidence, which the ALJ cited in support of
6 unchallenged reasons to discount Plaintiff's self-reporting, also supports the ALJ's finding that
7 Plaintiff's DAA was a contributing factor material to her disability.

8 For these reasons, the Court rejects Plaintiff's arguments that the ALJ's materiality
9 finding is based on an erroneous interpretation of the medical opinion evidence and/or is not
10 supported by substantial evidence. Plaintiff has not met her burden to show error in the ALJ's
11 materiality finding.

12 C. The ALJ Did Not Err in Discounting Certain Medical Opinions

13 Plaintiff argues that the ALJ erred in assessing the opinions of her primary care
14 physician, Paul Schmidt, D.O. Dr. Schmidt completed form opinions describing Plaintiff's
15 physical conditions and limitations, in June 2017, October 2018, and February 2019. *See* AR at
16 542-43, 796-807. In all three opinions, Dr. Schmidt opined that Plaintiff's conditions would
17 preclude sedentary work and lead to excessive absences. *See id.* The ALJ found that these
18 opinions were not persuasive indicators of Plaintiff's functioning with *or* without substance
19 abuse because they described disabling limitations due to rheumatoid arthritis and/or
20 fibromyalgia and a spine impairment, even though: (1) Plaintiff had worked for years with
21 rheumatoid arthritis and her rheumatologist indicated this condition was well controlled, (2)
22 fibromyalgia was not medically determinable, (3) Plaintiff's spine impairment was treated
23

conservatively and her pain improved with medication, and (4) the treatment notes often documented normal functional tests. *Id.* at 29-30.

Plaintiff argues that the ALJ's reasons for finding Dr. Schmidt's opinions unpersuasive are not legally sufficient under Ninth Circuit case law. (Dkt. # 7 at 12-15.) As discussed above, new regulations apply to the ALJ's assessment of medical opinions,⁴ but the Court finds that regardless of whether the Court applies the new regulations or Ninth Circuit case law, the ALJ's analysis was sufficient.

1. Rheumatoid Arthritis

The ALJ found that although Dr. Schmidt indicated that Plaintiff's rheumatoid arthritis caused disabling limitations, Plaintiff had worked for years with this condition and the rheumatology treatment notes indicated that it was controlled with medication. AR at 29. Plaintiff cites parts of the record showing that her symptoms persisted even with medication. (Dkt. # 7 at 12.)

The record contains substantial evidence, however, supporting the ALJ's interpretation. *See, e.g.*, AR at 477 (describing increased symptoms when Plaintiff stopped taking prescribed medications), 494 (Plaintiff cannot take certain medications for her rheumatoid arthritis because of her alcoholism), 605 (rheumatologist describes Plaintiff's rheumatoid arthritis as "well

⁴ Under the regulations, an ALJ "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s)[.]" 20 C.F.R. §§ 404.1520c(a), 416.920c(a). The ALJ must articulate and explain the persuasiveness of an opinion or prior finding based on "supportability" and "consistency," the two most important factors in the evaluation. *Id.* at (a), (b)(1)-(2). The "more relevant the objective medical evidence and supporting explanations presented" and the "more consistent" with evidence from other sources, the more persuasive a medical opinion or prior finding. *Id.* at (c)(1)-(2). The ALJ may but is not required to explain how other factors were considered, as appropriate, including relationship with the claimant (length, purpose, and extent of treatment relationship; frequency of examination); whether there is an examining relationship; specialization; and other factors, such as familiarity with other evidence in the claim file or understanding of the Social Security disability program's policies and evidentiary requirements. *Id.* at (b)(2), (c)(3)-(5).

1 controlled”), 619 (same), 770 (same), 778 (Plaintiff reporting increased symptoms but also did
2 not comply with a medication switch prescribed by rheumatologist).

3 Furthermore, as noted by the ALJ (AR at 29), Plaintiff’s rheumatoid arthritis was
4 managed by her rheumatologist, rather than Dr. Schmidt. *See id.* at 544, 786. Plaintiff’s
5 rheumatologist did not opine that her rheumatoid arthritis caused any particular limitations, and
6 instead his treatment notes as cited above indicate that he believed Plaintiff’s rheumatoid arthritis
7 was well-controlled with the medication regimen he developed. *See id.* at 605, 619, 770.

8 Because the record contains substantial evidence supporting the ALJ’s finding that
9 Plaintiff’s rheumatoid arthritis was well-controlled with medication, the ALJ reasonably found
10 that this evidence was inconsistent with Dr. Schmidt’s opinion describing disabling limitations
11 caused by rheumatoid arthritis. This reasoning satisfies the ALJ’s obligation under the new
12 medical regulations to explain the persuasiveness of an opinion based on its consistency with the
13 record, and it would also constitute a legally sufficient reason to discount an opinion under Ninth
14 Circuit authority. *See, e.g., Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (not
15 improper to reject an opinion presenting inconsistencies between the opinion and the medical
16 record).

17 2. *Fibromyalgia*

18 The ALJ next indicated that Dr. Schmidt’s opinions were less persuasive because they
19 accounted for limitations caused by fibromyalgia, which the ALJ found to be not medically
20 determinable. AR at 29. As explained *supra*, the ALJ did not err in finding Plaintiff’s
21 fibromyalgia to be not medically determinable, or in finding this portion of Dr. Schmidt’s
22 opinion to be unsupported. This reasoning satisfies the ALJ’s obligation under the new medical
23 regulations to explain the persuasiveness of an opinion based on its supportability, and it would

1 also constitute a specific, legitimate reason to discount an opinion under Ninth Circuit authority
2 predating the new medical regulations. *See, e.g., Dennis G. v. Comm'r of Social Sec.*, 2020 WL
3 3620100, at *10 (E.D. Wash. Mar. 30, 2020) (citing *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.
4 2007); SSR 96-8p, 1996 WL 374184, at *2).

5 3. *Spine Impairment*

6 The ALJ went on to find that Dr. Schmidt's opinions were unpersuasive as to Plaintiff's
7 spine condition because that condition was treated conservatively, Plaintiff's pain resolved with
8 medication, and her objective testing was mostly normal. AR at 29-30.

9 Plaintiff argues that her conservative course of treatment does not undermine her pain
10 complaints because she could not be treated more aggressively due to past surgeries as well as
11 her osteoarthritis. (Dkt. # 7 at 13.) She also contends that her pain did not entirely resolve, and
12 that the ALJ erroneously "played doctor" in finding the normal objective findings to be more
13 significant than the abnormal findings. (Dkt. # 7 at 13-14.)

14 As to Plaintiff's first argument: the ALJ himself acknowledged that Plaintiff's treatment
15 options were limited (AR at 28), but the ALJ also went on to emphasize that Plaintiff did not
16 comply with the treatment recommendations that were available to her, namely physical therapy.
17 *See id.* (citing *id.* at 681-704 (indicating that Plaintiff stopped attending physical therapy after
18 three visits and was discharged due to lack of contact)). Furthermore, the ALJ also
19 acknowledged some reports of pain and tenderness, as well as some abnormal objective findings
20 (*id.* at 28), but pointed to objective findings suggesting that Plaintiff's functional limitations were
21 not disabling, in light of her normal gait, full strength, intact sensation, no joint effusion, and full
22 range of motion. *See id.* at 467, 479, 603, 617, 749-50, 768, 774, 781.

1 This interpretation may not be the only reasonable interpretation of the record, but
2 Plaintiff has not shown that the ALJ erred in relying on many normal objective findings as
3 evidence inconsistent with Dr. Schmidt's opinions. This reasoning satisfies the ALJ's obligation
4 under the new medical regulations to explain the persuasiveness of an opinion based on its
5 consistency with the remainder of the record, and it would also constitute a specific, legitimate
6 reason to discount an opinion under Ninth Circuit authority predating the new medical
7 regulations. *See, e.g., Tommasetti*, 533 F.3d at 1041.

8 Because the ALJ's assessment of Dr. Schmidt's opinion complies with the new medical
9 regulations applicable to this case, and would also satisfy standards set forth in Ninth Circuit
10 case law, the Court finds that Plaintiff has not met her burden to show error in this portion of the
11 ALJ's decision.

12 V. CONCLUSION

13 For the foregoing reasons, the Commissioner's final decision is **AFFIRMED**, and this
14 case is **DISMISSED** with prejudice.

15 Dated this 19th day of April, 2021.

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18 MICHELLE L. PETERSON
19 United States Magistrate Judge
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